THE DUAL SYSTEM OF CIVIL AND COMMERCIAL LAW

We are in the habit of contenting ourselves with a division of law into two categories, the civil and the criminal. The civil we again divide into law and equity, and these further into a number of more or less inter-related subjects.

When we commence the study of the laws of Christian nations other than Great Britain, the Scandinavian countries, Switzerland and ourselves, we find that a large part of the law which we call civil[1] and a small part of the criminal have separated themselves off or grown up independently and form a distinct body known as commercial law.

In the whole field of law, where are we to place commercial law?

The separation of law into crimes, contracts, associations, negotiable instruments, torts, trusts, etc., cramps a larger and more scientific division. The student who looks into foreign treatises or has studied at a Continental law school is impressed with the fact that such a minute subdivision as we are accustomed to make is there regarded as of little importance. He finds law divided into natural and positive. Natural law is the eternal principles of justice and equity, based upon human nature and knowing no political boundaries. Positive law is national law, based on the principles of natural law and approximating them as closely as circumstances and history permit. Positive law is divided into ecclesiastical and civil law; the civil, into public and private. Public law is divided into international and national law, the latter of which includes political, administrative, penal and procedural law. Private law is divided into common law or civil law proper, and special law or commercial law.

What is commercial law?

At the outset, we must adopt this more scientific classification of law. The convenient classification of the digests or from which

[1] The term "civil law" is here employed in opposition to "criminal law." It may be used in three other senses: (*a*) meaning the law which is the survival of the Roman law in opposition to the English "common law;" (*b*) in opposition to the "commercial law;" (*c*) in opposition to "ecclesiastical law."

the student in an American law school fills up his roster will not aid us, nor will it help us to run down the index of a commercial code and say that this is commercial law: Admiralty, Associations, Bankruptcy, Brokers, Carriers, Insurance, Negotiable Instruments, Sales, etc. Some of these acts will be civil or commercial according to the circumstances under which they are performed or to the persons accomplishing them.

Commercial law is a division of private law. Its boundaries can not be fixed by an enumeration of subjects, for, while containing subjects peculiar to it and not treated of in the civil law, it overlaps practically the whole field of contract law and so invades the province of the civil law. A contract made by A. B. under one set of circumstances will be commercial and fall under the jurisdiction of the commercial law; made by the same person under different circumstances it will be civil and come within the jurisdiction of the civil law. Or the same contract made by A. B. may be commercial and when entered into by C. D. may be civil; or, what may seem yet more strange, the identical contract may be commercial from the point of view of the promissor and civil from that of the promissee.

Content, then, to regard commercial law as simply a part of private law, let us search for a criterion that will establish its limits, and having so defined it, examine its relations to the civil law. That commercial law is the body of rules regulating commerce is self-evident. But commerce is a slippery term and great progress has not been made unless we define the term "commerce."

In economics, man's efforts towards the production of wealth are divided into the extractive, manufacturing and distributive industries. The extractive industries are those which take from nature the raw materials; for example, agriculture, mining and fishing. The manufacturing industries are those which convert the raw materials into objects of use to mankind. The distributive industries are those which place the products at the disposition of the consumer. In law the word commerce, roughly speaking, comprehends the last two of these divisions of industry, the manufacturing and the distributive. Commerce is the approximation of the raw material to the consumer. It signifies acts performed upon things, in the nature of an exchange and for a profit.

The essentials of commerce are:

First. That it be an intermediate branch of human activity, between the producer and the consumer. We do not have to be told that those engaged in agriculture, mining and fishing are not merchants, or that the individual purchasing articles for his own consumption is not a merchant because of his act.

Second. That the approximation of the article to the consumer take place by the instrument of exchange. The merchant "traffics" in goods. He has no intention of consuming them himself. They come and go. He acquires goods only with a view to pass them on again a step nearer to the consumer, and in the same or in altered form. This confirms the statement that commerce must be an intermediate act. The farmer, mine-owner and fisher do not buy but produce with a view to sale, while the consumer buys, but lacks the intent to sell. The element of exchange is lacking in each case.

The act need not be a pure exchange. It may be an auxiliary act intended to facilitate and extend exchanges. So transport, assurance and association are acts which facilitate and extend exchanges.

Third. That the act of exchange be habitual. One who performs such an act incidentally or accidentally is no more a merchant than one who, by hazard, is called upon or offers to assist an injured or sick person is a surgeon or doctor. It is this characteristic which may be lacking in many acts of the merchant when not performed in the pursuit of his trade and which prevents many acts of a non-merchant, though clothed with commercial form, from being declared commercial.

Fourth. That there exist the intent to make a profit. This is the speculative aspect of commerce—the hope of gain. Commerce is composed of exchanges and exchanges are born of contracts and these contracts must be founded upon a consideration. A gift can not be a commercial act.

It is scarcely needful to add that an act performed with a view to gain remains commercial though it result in a loss.

Therefore, the manufacturer, wholesaler, retailer, jobber, broker, banker, commission merchant or merchant of any kind, engaged in trade as an intermediary, are engaged in commerce according to the legal significance of that term.

The principles of law governing these transactions form the commercial law. It is the law governing individuals engaged in the manufacture and distribution of objects, for the sake of a profit. The civil law is the law governing individuals in their relations to each other who are not so engaged. The two are like circles that overlap, each having a sphere proper to itself, while a sphere remains common to them both. This common sphere is the law of contracts in its multiple phases. The civil law regulates the general principles of contracts, the commercial law supplies special rules. For contracts, particularly sales, may be born either within or without the world of commerce. An example will make this clear. A student purchases books from a fellow-student who has no further use for them. Neither speculates in books regularly for a profit. The act may be said to be accidental. It is not commercial. But a student purchases books in a book shop. The book seller has performed a commercial act because he trades in books habitually. He is a distributor. The student has not performed a commercial act. He, as consumer, has bought the book for his personal use. In English and American law, all of these acts would be governed by the same law. In countries having a separate commercial jurisdiction, this would not be true. A different law would apply in each case.

Commercial law is private law. But it may have an international phase, when the commercial laws of two sovereign states come in conflict. It has likewise a relation to public law. It was not likely that commerce could have reached its actual development without interesting the State as such, as well as the individual. In some countries, commercial monopolies exist, controlled by the State. In France, stock brokers are government officials. The law regulating their acts is at once public and commercial. The manufacture of the products of tobacco and the direct or indirect ownership of railroads by the State, give rise in several European countries to public commercial law. Wherever special courts have been created to try commercial cases, the laws constituting those courts are public and commercial. Bankruptcy, which is a field solely commercial in most countries except England and the United States, has a penal or public aspect.

Commerce gives rise to another set of problems as well. The

employment of labor in all three forms of industry gives rise to regulative and police laws. These together with the laws regulating the association of capital into syndicates, trusts and cartels, and the protection of industrial property such as patents, copyrights and trademarks all have their *raison d'être* in commerce, yet do not regulate acts of trade as such. Together all are known as industrial law. That part which regulates labor, wherever it does not form a code of itself, has been absorbed into administrative law, while that part regulating industrial property has been incorporated by a process of association into the commercial codes or forms the subject of special laws.

Why is it that the dual jurisdiction of civil and commercial law has grown up in some countries and not in others? If two countries so eminently commercial as are Great Britain and the United States treat the merchant and the non-merchant the same before the law, why should less commercial countries, like Italy, Spain, France and Germany, have separate jurisdiction?

The line of separation between those countries where the dual system exists and those where it is not found, coincides so nearly with the boundaries that divide the territory of the *droit écrit* or the Roman law from that of the *droit coutumier* or customary law that it is impossible not to conclude that here lies the clue.

The Roman law was a very formal law. Its early rigors were only partially mollified and supplemented by the prætorian-made law, much as the English chancellor through equity has mollified and supplemented the English common law. Yet Roman law remained a formal law. The civil codes of Europe and Latin America, which are the modernized survival of the ancient Roman jurisprudence, partake of the character of their origin. They are stiff and formal. Until the twelfth century, the Roman law sufficed. But with the rise of the great commercial cities of Italy, the civil law became inadequate. Commercial customs gradually grew up, administered by special judges whose judgments came to be given the sanction of law. Later, these customs were codified. While the civil law has come down to us with singularly little change, the commercial law remains essentially customary and goes on modifying and developing, meeting a host of new conditions and problems.

This is the origin of the commercial jurisdiction. What may be said of its present day jurisdictions? They are, in general, three:

First. The commercial law simplifies the civil law. We have a distinct law merchant in the law of negotiable instruments. Within its limited field, it simplifies the law of contracts. A formal written assignment would be a clumsy method of transferring a bill of exchange. The law therefore recognizes indorsement as a means in derogation of the common law rule. The law regarding consideration in negotiable instruments is likewise a law favorable to commerce and in derogation of the common law. In admiralty there exists a whole body of law that grew up independently, because of the inadaptability of the common law of contracts to the peculiar risks of maritime trade.

To inquire into the reasons why the English common law is less formal than the Continental civil law would be most interesting. Our land law yet retains much of the formalism of feudal times. No doubt the reason is that land is outside of commerce. Most of our law of contracts dates from a period posterior to the rise of commerce on the Continent and the simultaneous development of the custom of merchants in the fairs, crafts and guilds and in the so-called "consular" jurisdiction of the Middle Ages.

Until the seventeenth century, the powerful merchant guilds retained, even in England, jurisdiction over litigation between merchants, applying their own customs, which were essentially the same as those obtaining in like jurisdictions on the Continent. In the eighteenth century, Lord Mansfield drew freely from the law merchant of the Continent in developing the English law of contracts.

The highly formal civil codes lend themselves ill to the needs of commerce, which require that acts be performed with celerity. The acts of the merchant in the pursuit of his trade are very different from the deliberate acts of the retired individual who is not so engaged. The acts of the former having legal significance are multitudinous, while those of the latter are very limited in number. The non-merchant is not hurried in the preparation and the performance of those acts. His contracts that amount to over 150 francs he may reduce to writing without inconvenience and he will not then need parole testimony to prove his right. (French

Civil Code, Art. 1341). Such a law would be an intolerable burden to commerce.

Second. In commerce, much depends upon the strict observance of the contracts that constitute the channels through which flow the merchant's profits. In such matters the Civil Code of France, to take an instance, is lenient. Article 1244 permits the judge to use his discretion in allowing extensions of time.

The commercial law safeguards the merchant in these respects, by subjecting him to certain peculiar obligations and penalties. It obliges him to keep books; subjects him to the quasi-penal laws of bankruptcy, to which he would not be subject were he not a merchant; abolishes days of grace in the performance of contracts and in some countries sanctions personal attachment for debts arising in commerce.

Third. Special laws are needed to regulate the transactions of certain institutions which owe their existence to commerce and which would not exist but for it. Such institutions are exchanges and markets, banks, commercial paper and carriage by land and sea. In these matters the civil codes, laying down but the fundamental rules of contracts and of personal property, are wholly inadequate. The commercial codes supply what would be an absolute want of law in such matters and, in others, special rules in derogation of the civil codes.

We have yet to examine the relations of the commercial law to the civil law. As to this three theories obtain: 1. That which regards commercial law as dependent upon and supplementary to the civil law. 2. That which regards the commercial law as an independent body of jurisprudence. 3. That which favors a unification of the whole of private law.

The question is not a purely academic one. In Europe, it has found its way into parliaments where commercial codes have to be continually revised and brought to date.

1. The civil theory. While commerce was certainly far from being unknown to the Romans, it did not reach such a development but that commercial transactions could be satisfactorily regulated by applying the same rules alike to merchant and non-merchant. No powerful merchant class existed in Roman society. Guilds and crafts belong to the Middle Ages. In this respect Roman law

was like English law. But it must be observed that the Roman law of obligations was like the modern civil law of obligations, unmodified by commercial law; while the English law of contracts may be likened to the civil law altered and supplemented by the commercial law.

Though Roman law underwent in the Middle Ages, as it came to be adopted throughout Europe, such alterations as were necessary to suit the conditions of society in each nation, it was yet unfitted to meet the requirements of commerce for the reasons already enumerated.

It was then that greater and greater weight was given to an increasing number of customs of merchants and that these customs were reduced to writing to make them more certain. We have seen that these customs were supplementary to and in derogation of the civil law.

The commercial law is therefore not a body of independent law, sufficient unto itself, but a special law, opposed to the civil law, completing it and itself requiring the civil law to be complete. Commercial law was the corrective of the civil law, which existed centuries before it. Wherever, in commercial transactions, the need of modifying the civil law has not been felt, the civil law remains in full vigor and operation.

The dependence of the commercial codes upon the civil codes for the general principles of contract law, seems convincing of the interdependence of the two jurisdictions. Thus in the law of sales, the largest branch of commercial transactions, the commercial codes, as a rule, deal only with the question of the proof of the contract, leaving the general principles to the civil codes.

2. The mercantile theory. Those who believe that commercial law is an independent branch of private law argue that the civilians have been led into error because commercial law, being a law later than civil law, appears to be supplementary. Commercial law, they say, arose out of its own peculiar economic necessities—that is to say, the rise of a merchant class and of a mercantile profession and with them of a whole series of acts that find no reflection in the civil law, such as commercial insurance, bills of exchange, joint stock companies, etc.

3. The unification theory. A third group of writers holds up

Great Britain, the United States and Switzerland, as examples of nations in which the unification of private law has taken place with success. They argue that the division of private law into a special and a common law is a relic of a time when commerce was a profession limited to a special class of society and that today, when commerce is free to everyone who wishes to engage in it, such a division is arbitrary and unjust. They point out that the line separating the two jurisdictions forms a debatable ground that gives rise to fruitless litigation.

In criticism of the ideal of unification it should be said that it might cause a check to the rapid advancement of international law. Civil law is a peculiarly national law. It treats of the sanction of property, of the family and marriage relations. It is deeply impregnated with the racial traits and history of a country. On the other hand, commercial law is a peculiarly international law for two reasons: 1. Because trade gives rise to approximately the same economic needs wherever it exists, that is to say, to celerity, lack of formality, rigorous sanctions and credit. 2. Because commerce itself is international.

Now, if the commercial law is absorbed into the civil law, the tendency will be to nationalize it and so crystallize it. External forces will meet with greater resistance. And it may be added that this hardening process would make it less apt to keep pace with the advancing needs of commerce. The example of Great Britain and the United States can hardly be used as an argument since in these countries both civil and commercial law are customary.

Even in those countries where the law merchant has been codified, customs are given a high sanction. When a commercial transaction gives rise to an action at law, recourse must first be had to the commercial code; second, to approved customs and lastly to the civil code.[2] This is but applying the wellknown principle that the exception, wherever it is applicable, must control in preference to the general rule.

Commercial law is necessarily a more fluid, changing law than the civil law and no code has the pretension of claiming to provide

[2] Several articles of the French Civil Code expressly recognize the priority of the Commercial Code in commercial transactions. Arts. 1107, 1153, 1341, 2084. Likewise the Spanish Commercial Code, Art. 2.

for every possible contingency. It was born a customary law and codification added only the sanction that greater certainty must give. There still remains in each country an important mass of approved customs that are followed in the absence of written law, and which, in first instance, become a rich source of commercial legislation and finally a source of civil law. These customs are special in the same sense that the commercial codes are special law in opposition to the civil codes, and therefore they are consulted before recourse is had to the civil codes.[3]

Like equity, the commercial law has been a corrective. But it has forged ahead in its own path and far outstripped the civil law. As the common law is today borrowing equitable principles so the civil law is continually approximating towards the commercial law. It is certainly within the realm of possibility that the time will arrive when the dual form will have passed into legal history.

Commercial law has been compared very graphically to a snow-capped mountain.[4] The fresh snows that fall upon its summit represent the ever newly arising customs of merchants. The snow creeps down the mountain side hardening into glaciers and giving rise to streams that feed the rivers of the plains. So the commercial customs are crystallized into commercial laws from which they gradually pass into the realm of civil law.

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[3] The authority of approved commercial customs is recognized in Arts. 1135, 1159, 1160, 1873, of the French Civil Code and in Art. 2, of the Spanish Commercial Code.

[4] Goldschmidt "System des Handelsrecht."